

Remember the PFCRA

The Program Fraud Civil Remedies Act (PFCRA) has been a little-used hammer in the NASA OIG toolbox. The PFCRA was enacted in 1986 to allow Federal agencies to pursue administratively “small” (up to \$150,000) false claims and false statements. The Justice Department often declines to prosecute matters with low potential recovery. The PFCRA provides another remedy for agencies. This “mini False Claims Act” is codified at 31 U.S.C. §§ 3801-3812. NASA regulations are set forth at 14 C.F.R. Part 1264.

The PFCRA establishes administrative procedures for executive agencies to use against anyone who makes a false claim or false statement to the agency which the person knows or has reason to know is false, fictitious, or fraudulent. The agency investigates the alleged violations, and if substantiated, the agency can initiate an administrative hearing to determine liability. A person found liable may be penalized up to \$5,000 per claim or statement, and may also be required to pay double the amount falsely claimed.

The PFCRA does not create any new violations or change the way agencies receive allegations of false claims or false statements. It simply provides an additional legal remedy. The PFCRA's substantive provisions are essentially the same as the False Claims Act, e.g., same standard of knowledge, same burden of proof. No proof of specific intent to defraud is required.

The investigating official, at NASA the Inspector General, has authority to investigate allegations of liability under the PFCRA, which includes the power to subpoena documents and other non-testimonial information. However, DOJ recommends that OIGs use IG Act subpoena authority. If the investigating official concludes that an action is warranted, he or she submits a report of investigation to the reviewing official. The reviewing official, at NASA the Associate Administrator for Management, reviews the investigative report to determine whether there is adequate evidence to believe that the person named is liable under the law. Upon determining there is adequate evidence, the reviewing official sends a written notice of intent to issue a complaint to the Department of Justice. The reviewing official must be independent of the investigating official.

The Department of Justice has 90 days to approve or disapprove the issuance of an agency complaint. By DOJ regulation the Assistant Attorney General of the Civil Division is responsible for making the determination. If the complaint is approved the reviewing official may serve the complaint on the defendant. The defendant may request a hearing by filing an answer within 30 days of receiving a complaint. If the defendant fails to file an answer, the presiding official may issue an initial decision without a hearing.

The agency appoints the presiding official (usually an Administrative Law Judge,

or ALJ) on a case-by-case basis to handle PFCRA hearings. NASA has no ALJs on staff; it would have to arrange with another agency to detail one for a hearing. The presiding official supervises discovery and conducts the hearing according to the Administrative Procedure Act (APA). He or she may subpoena witnesses and documentary evidence. In addition the law provides the defendant a number of specific hearing rights, such as right to counsel and the right to cross-examine witnesses.

The agency, through its Associate General Counsel (General), has the burden of proving its case by a preponderance of the evidence, that it is more likely than not that the defendant committed the alleged violation. The presiding official issues an initial decision including findings of fact and conclusions of law, and the amount of any penalties and assessments imposed. The PFCRA provides for appeal from an initial decision to the agency head. The agency head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment. If the agency head determines that the defendant is liable for a penalty or assessment, the defendant may appeal to an appropriate United States District Court within 60 days of notice of final decision by the authority head. The district court may not set aside an agency decision unless it is found to be unsupported by substantial evidence in the whole record.

The PFCRA is designed to provide a remedy for frauds with a low amount in damages. Inflated employee travel claims, false certification allowing the improper award of a research grant, and payment for a small number of substituted products are a few situations where the PFCRA could be applied. If you have a case you believe would be a good candidate for utilizing the PFCRA, please contact one of the OIG attorneys.